Supreme Court, U.S.
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No. 00-1699

In the
Supreme Court of the United States

BELLSOUTH TELECOMMUNICATIONS, INC.,
Petitioner,

v.

NORTH CAROLINA UTILITIES COMMISSION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF IN OPPOSITION

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June 13, 2001 ****Counsel of Record***

QUESTIONS PRESENTED

I. WHETHER A STATE PUBLIC UTILITY COMMISSION'S ACTION RELATING TO THE ENFORCEMENT OF A PREVIOUSLY APPROVED SECTION 252 INTER-CONNECTION AGREEMENT IS A "DETERMINATION UNDER [SECTION 252]" AND THUS IS REVIEWABLE IN FEDERAL COURT UNDER 47 U.S.C. § 252.

II. WHETHER, IF 47 U.S.C. § 252(E)(6) DOES NOT SUPPLY JURISDICTION, A FEDERAL DISTRICT COURT HAS INDEPENDENT SUBJECT MATTER JURISDICTION UNDER 28 U.S.C. § 1331 TO DETERMINE WHETHER A STATE PUBLIC UTILITY COMMISSION'S ACTION INTERPRETING OR ENFORCING AN INTERCONNECTION AGREEMENT VIOLATES THE TELECOMMUNICATIONS ACT OF 1996.

III WHETHER A STATE COMMISSION'S PARTICIPATION IN IMPLEMENTING THE TELECOMMUNICATIONS ACT OF 1996, WHICH PROVIDES THAT STATE COMMISSION DETERMINATIONS UNDER IT ARE REVIEWABLE IN FEDERAL COURT, CONSTITUTES A WAIVER OF ELEVENTH AMENDMENT IMMUNITY.

IV. WHETHER A SUIT TO ENJOIN STATE PUBLIC UTILITY COMMISSIONERS FROM ENFORCING A COMMISSION DECISION ENFORCING AN INTERCONNECTION AGREEMENT PREVIOUSLY APPROVED UNDER THE TELECOMMUNICATIONS ACT OF 1996 CAN BE MAINTAINED UNDER THE *EX PARTE YOUNG* DOCTRINE.

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BRIEF IN OPPOSITION

NORTH CAROLINA UTILITIES COMMISSION'S RESPONSE TO PETITION FOR A WRIT OF *CERTIORARI*

Respondent North Carolina Utilities Commission ("NCUC") does not oppose the petition for writ of *certiorari* seeking review of the opinion of the Circuit Court of Appeals for the Fourth Circuit reported at 240 F.3d 270 (2001) because some questions presented in this petition are essentially the same as those already before this Court in the case *Mathias v. WorldCom Technologies, Inc.*, 121 S. Ct. 1224, 149 L. Ed. 2d

135 (2001), and the decisions of the Fourth and Seventh Circuits conflict.

However, Respondent opposes the Petitioner's request that this petition for *certiorari* be held pending resolution of *Mathias* and *Verizon Maryland, Inc. v. Public Service Commission of Maryland*, No. 00-1531 (petition for cert. filed Apr. 5, 2001) ("*Verizon Maryland*") (petition for cert. pending from *Bell Atlantic Maryland, Inc. v. MCI Worldcom, Inc.*, 240 F.3d 279 (4th Cir. 2001) ("*Bell Atlantic*")). The Respondent NCUC would prefer that this Court grant *certiorari* as to those questions and consolidate this case for oral argument with the *Mathias* case.

In any event, the Respondent respectfully disagrees that the *Ex parte Young*[1] question is properly preserved for review in this case. Petitioner never sued the NCUC Commissioners despite notice of the omission in district court. Even in the Fourth Circuit Petitioner never moved to amend and the Fourth Circuit rightly ignored Petitioner's suggestion that the Court authorize an amendment if it believed there was an Eleventh Amendment problem.

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[1] *Ex parte Young*, 209 U.S. 123 (1908)

STATEMENT OF THE CASE

Introduction

The seed from which this case has grown is a matter of contract interpretation, put to the NCUC for consideration when disputes arose between several competing telecommunications providers and BellSouth Telecommunications, Inc. ("BellSouth"). The contracts involved are interconnection agreements that were reached through negotiation or arbitration as called for in the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 66 (the "Act," the "1996 Act" or the "Telecommunications Act"), and no party claims to be aggrieved by the NCUC's approval of the agreements. Nor does any party contest that the NCUC had jurisdiction to interpret the terms of the agreements in the subsequent complaint proceedings. The NCUC interpreted the agreements to require payment where BellSouth argued none was due. Unhappy with that result, BellSouth sought review of the decisions. Rather than file appeal in State court, however, suit was filed against the competing providers and the NCUC in federal district court for judicial review as well as injunctive and declaratory relief. Thus arise the complex questions in this case: Whether a federal court has jurisdiction to review the decision of a State agency and whether such an action against a State commission is barred by sovereign immunity.

The Court of Appeals for the Fourth Circuit has found the suits against the NCUC are barred by sovereign immunity and should be dismissed. The Court found the NCUC decisions

should have been appealed in State court, not challenged by suits filed in federal court based on the Telecommunications Act or other general substantive federal jurisdiction. These determinations conflict with the decision reached by the Court of Appeals for the Seventh Circuit in *Mathias*. Under similar circumstances, the Seventh Circuit found State sovereign immunity was waived, and found such suits *must* be brought in federal court, pursuant to § 252 of the Telecommunications Act, for a determination whether federal law has been violated. After federal court review, the Seventh Circuit would then allow issues of contract interpretation to be addressed in State courts.

Proceedings Before the NCUC

This case addresses three suits filed by BellSouth in federal district court seeking relief from decisions of the NCUC with respect to complaints by three competing local exchange carriers ("LECs"): U.S. LEC of North Carolina, L.L.C. ("US LEC"), Intermedia Communications, Inc. ("Intermedia"), and MCImetro Access Transmission Services, Inc. ("MCImetro"). The competing LECs complained to the NCUC, in pertinent part, that Petitioner BellSouth was in breach of its interconnection agreements with them for failing to pay reciprocal compensation for calls from BellSouth customers to internet service providers ("ISPs") served by the competing carriers.[2] BellSouth disputed that compensation was due under

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[2] The agreements with US LEC and Intermedia were arrived at through negotiation pursuant to 47 U.S.C. § 252(a), and though some

the terms of the agreements. The NCUC ruled in favor of the competing carriers, finding that the reciprocal compensation provision applies to ISP calls when the originating caller and the called number are associated with the same local calling area. The NCUC directed BellSouth to pay reciprocal compensation for such calls, including amounts past due plus interest and amounts coming due in the future. *In re Interconnection Agreement Between BellSouth Telecomms., Inc., and U.S. LEC of North Carolina*, LLC, Docket No. P-55, Sub 1027 (NCUC Feb. 26, 1998), Pet. App. 106a, 114a; *In re Enforcement of Interconnection Agreement Between Intermedia Communications, Inc., and BellSouth Telecomms., Inc.*, Docket No. P-55, Sub 1096 (NCUC Nov. 4, 1998), Pet. App. 92a, 98a; *In re Complaint of MCImetro Access Transmission Servs., Inc. against Bell South Telecomms., Inc., for Breach of Approved Interconnection Agreement*, Docket No. P-55, Sub 1094 (NCUC Feb. 10, 1999), Pet. App. 17a, 70a-72a. The parties have agreed that substantial sums of money are involved.

District Court Decision

Relying on the Telecommunications Act of 1996 and 28 U.S.C. §§ 1331 and 1332 for subject matter jurisdiction, BellSouth sued the competing carriers and the NCUC in federal

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portions of the MCImetro agreement were arbitrated pursuant to 47 U.S.C. § 252(b), the reciprocal compensation term was arrived at through negotiation as well. The NCUC approved the interconnection agreements in earlier proceedings, and no review of the approval of the reciprocal compensation term was sought by any party.

court, in separate actions, seeking declaratory and injunctive relief from the Commission's decisions. *See* Order filed May 24, 1999 in *BellSouth Telecomms., Inc. v. US LEC of North Carolina L.L.C.*, No. 3:98CV170MU, Pet. App. 115a (the *US LEC* case); Order filed May 20, 1999 in *BellSouth Telecomms, Inc. v. Intermedia Communications, Inc.*, No. 3:99CV5MU, Pet. App. 99a (the *Intermedia* case); and Order filed May 20, 1999 in *BellSouth Telecomms., Inc. v. MCImetro Access Transmission Serv., Inc.*, No. 3:99CV97MU, Pet. App. 85a (the *MCImetro* case). BellSouth argued that the Telecommunications Act provided authority to name the NCUC as a defendant in the cases. In each case, the NCUC moved to dismiss BellSouth's suit for lack of subject matter jurisdiction and Eleventh Amendment immunity. In the *US LEC* case, the first of the three, BellSouth responded in its Memorandum in Opposition to the North Carolina Utilities Commission filed June 23, 1998, that its action was not barred by the Eleventh Amendment because it was entitled to seek injunctive relief under the *Ex parte Young* doctrine. The NCUC, in its Reply to BellSouth's Memorandum Opposing NCUC's Motion to Dismiss the Complaint, filed July 8, 1998, argued *inter alia* that the *Ex parte Young* doctrine was inapplicable as only the NCUC itself had been sued. BellSouth did not move to add the Commissioners as parties, however, and later failed to make the Commissioners party to the other cases as well, although similar arguments were posed again.

While the suits were still pending in district court, the Federal Communications Commission ("FCC") released a Declaratory Ruling on February 26, 1999, concluding that calls

to internet service providers are largely interstate, rather than local, for purposes of determining reciprocal compensation. This Ruling is relied on by the Petitioner in support of its argument that federal policy does not support treating ISP traffic as local. However, the FCC Ruling specifically recognized the validity of State commission determinations treating ISP-bound traffic as local, pending issuance of a federal rule about how to handle such traffic, noting it had itself treated such calls as if they were local under a longstanding policy. *See In re Implementation of the Local Competition Provisions in the Telecomms. Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd 3689, 3703 (¶ 23, 24) (Feb. 26, 1999), *vacated, Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000).[3]

Soon after the FCC's Declaratory Ruling was issued, the district court ordered the parties in the *Intermedia* case to brief the court as to the impact of the Declaratory Ruling on the case. Upon receiving those briefs, the district court then issued orders in all three cases finding that it had jurisdiction to review the NCUC orders pursuant to § 252 of the Telecommunications Act. Then, "[turning] to the merits of the case," it remanded the

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[3] In its recent Order on remand, the FCC acknowledged again the authority of State commissions to determine that reciprocal compensation terms in interconnection agreements are applicable to ISP calls, pending issuance of a federal rule, and gave only prospective effect to the new interim pricing mechanism. Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecomms. Act of 1996*, CC Docket Nos. 96-98, FCC 01-131, 2001 FCC LEXIS 2340, ¶ 15, ¶ 77, ¶ 78 (rel. Apr. 27, 2001).

cases to the NCUC for "reconsideration" in light of the FCC Ruling and dismissed the cases without prejudice. Pet. App. 85a, 89a (*MCImetro* case). The district court failed to address whether the Eleventh Amendment barred the suit, finding it unnecessary to do so "at this time." Pet. App. 89a-90a. *See* Pet. App. at 103a-105a (in the *Intermedia* case); Pet. App. at 89a-91a (in the *MCImetro* case); Pet. App. at 116a-117a (in the *US LEC* case).

The Fourth Circuit Decision

The NCUC and one competing carrier, US LEC, appealed. The cases were consolidated for review by the Fourth Circuit and were scheduled by the Court to be heard *seriatim* at oral argument with *Bell Atlantic*. The sovereign immunity issue was considered first. The Fourth Circuit considered the sovereign immunity issue first. The Court found that the district court erred when it asserted jurisdiction over a State and then exercised its jurisdiction by ordering further briefing and a remand while deferring the immunity issue until the case returned to the court. Pet. App. 10a ("Its refusal to address the Eleventh Amendment issue at the outset . . . interfered with North Carolina's sovereignty as protected by the Constitutional structure." (citation omitted)). The Court considered and rejected arguments from BellSouth and the United States, as intervenor, that the NCUC had waived its sovereign immunity by accepting a gift or gratuity when it engaged in the regulatory process for review of interconnection agreements pursuant to 47 U.S.C. § 252. Pet. App. 9a. The Court reasoned, "Congress's intent to condition participation in a federal program on waiver

of such immunity must be explicit and unmistakably clear." Pet. App. 9a; *See Bell Atlantic*, 240 F.3d at 289-90[4] (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 247 (1985); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981).

The Court found no such clear statement of intent in the Telecommunications Act. *See Bell Atlantic*, 240 F.3d at 293-94 ("[W]e have searched in vain for any statement of congressional intent to condition a State utility commission's participation in the 1999 Act's regulatory scheme on the waiver of its constitutionally predicated sovereign immunity."). In other contexts, by comparison, the Court observed that Congress has explicitly stated its intent to condition participation in a federal program on waiver of sovereign immunity, *e.g.*, the Rehabilitation Act, 42 U.S.C. § 2000d-7(a)(1), enacted under Congress's spending clause power. *Id.*, 240 F.3d at 292 ("That act states outright that a State 'shall not be immune under the Eleventh Amendment . . . from suit in Federal court' for a violation of the act's anti-discrimination edict." (citation omitted)).

Focusing in particular on the language in § 252(e)(6) that allows suit in federal court for review of certain State commission determinations, the Court found,

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[4] This case was decided contemporaneously with *Bell Atlantic*, a similar case on appeal from the District Court of Maryland, and reference is made to the Maryland decision for detailed discussion of the Court's legal analysis.

> A State official reading this provision would have no indication that the State commission, if it chose to make the reviewable determination, would be compelled to appear in federal court at the behest of an aggrieved telecommunications company. Even assuming Congress conferred a gift on State utility commissions by allowing them to participate in the regulation of telecommunications - - a gift that is difficult to discern* - - the language of § 252 (e)(6) simply falls short when examined under our "stringent" tests for determining whether a State has waived its immunity from federal court jurisdiction.
>
> *Fn: The district court noted that the Act "stripped the states of local power to regulate telecommunications that had been vested in them for decades," and remarked, "Some gift." Cf. Virgil, Aeneid, bk. II, l. 49 ("Whatever it is, I fear Greeks even when they bear gifts" (reporting the comments of the Trojan priest Laocoon upon *seeing* the large wooden horse left by the Greeks as a "gift" to the city of Troy)).

240 F.3d at 293 & n3.[5]

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[5] Aside from the skepticism implied in this quote, the Fourth Circuit apparently did not feel it needed to reach the question whether the State commissions were offered a "gift" or "gratuity," rather than a

Thus, the Fourth Circuit concluded the NCUC, like the Maryland Public Service Commission, was an agency of the State, entitled to dismissal on sovereign immunity grounds. Pet. App. 9a.

Next, the Fourth Circuit considered whether federal courts are granted jurisdiction in 47 U.S.C. § 252 (e)(6) to review State commission decisions enforcing previously approved interconnection agreements.[6] It concluded they are not. The Court found the language in § 252(e)(6) specifies a narrow basis for bringing federal suit, to consider decisions approving or rejecting interconnection agreements, and cannot be read to infer a broad basis for, or scope of, federal jurisdiction. It quoted from its companion decision in *Bell Atlantic*:

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sanction, or whether such a "gift" would be overly coercive. The NCUC contended that regulating interconnection agreements between competing local exchange carriers was an "otherwise lawful activity" in which it was already authorised to engage prior to enactment of the Telecommunications Act of 1996. As such, under *Seminole Tribe v. Florida*, 517 U.S. 44 (1996) and *College Savings Bank v. Florida Prepaid Post Secondary Education Expense Board*, 527 U.S. 666 (1999), Congress had no authority to condition the State's continued participation in that activity upon its waiver of its sovereign immunity.

[6] While the Court found the case should be dismissed as to the NCUC on sovereign immunity grounds, the jurisdiction issue was considered to determine whether the suits should be dismissed against carriers as well. Both the NCUC and US LEC appealed to the Fourth Circuit on jurisdiction grounds.

> While this federal jurisdictional provision authorizes review of § 252 arbitration determinations ultimately leading to the formation of interconnection agreements, in the final analysis, the State commission determinations under § 252 involve only approval or rejection of such agreements. With respect to negotiated agreements in particular, the federal review is narrower. The *only* 'determination' that can be made by the State commission under § 252 on a negotiated agreement is a determination to approve or reject it, and when the agreement is approved by the State commission, then there is a question whether there can be any "party aggrieved" to seek review in federal court.

Pet. App. 12a (citing *Bell Atlantic*, 240 F.3d at 302-03 (footnote omitted in original) (emphasis in original)). The Court found these enforcement decisions considered disputes that "involve contract administration and turn on the proper interpretation of these agreements and their proper enforcement," not the approval or rejection of the agreements themselves. Pet. App. 12a.

The Fourth Circuit determined that Congress intended to reserve "non-§ 252 determinations" made by State commissions, including those enforcing terms of interconnection agreements, for review in State courts pursuant to State law. Pet. App. 12a. It found from a review of the 1996

Act that Congress clearly intended to divide responsibility between federal and state regulators. *Bell Atlantic*, 240 F.3d at 300-01. Further, the Court found a clear intent to leave pre-1996 Act assignments of responsibility in place unless the 1996 Act expressly provided for federal responsibility. The Court found this point was explicitly made by Congress in § 601 (c)(1) of the 1996 Act, which states:

> This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.
>
> Pub. L. No. 104-104, 110 Stat. 56, 143 (1996) (codified at 47 U.S.C. § 152 note) (emphasis added).

Id., 240 F.3d at 301. The Court found that State commission authority to enforce interconnection agreements derives from the residual authority of State commissions and State courts, conferred by 47 U.S.C.§ 152 and by State law, and preserved by the 1996 Act. *Id.*, 240 F.3d at 306. Thus, the Court found that such "non-§ 252 determinations" are left for review by State courts, as provided by the existing law of the State that created the State commission. *Id*; *also see Turner v. Bank of North-America*, 4 U.S. 8, 11 (1799) (statutory jurisdiction of federal courts is strictly construed). It found the NCUC has jurisdiction over the administration of interconnection agreements entered into by public utility companies under its jurisdiction,

referencing as authority North Carolina General Statutes §§ 62-2, 62-30, 62-32, 62-60, 62-74, 62-110(f), and 62-133.5. Pet. App. 13a. It found the 1996 Act preserves judicial review of such decisions in State courts and referenced the relevant North Carolina provisions. Pet. App. 13a (citing N.C. GEN. STAT. §§ 62-90 and 62-96).

Finally, the Fourth Circuit found that the exercise of general federal-question jurisdiction under 28 U.S.C. § 1331 is not available in this context, as such a result would undermine the carefully considered intent of Congress in the 1996 Act to provide limited review of State commission decisions in federal court and leave other review to State commissions and State courts. Pet. App. 13a (citing *Bell Atlantic*, 240 F.3d at 307).

REASONS WHY THE PETITION FOR CERTIORARI IS NOT OPPOSED EXCEPT AS TO THE *EX PARTE YOUNG* QUESTION

The Petitioners argue that this case presents the same questions on which this Court granted *certiorari* in *Mathias*. The NCUC agrees that this case presents two questions that are essentially the same. Indeed, the decisions of the Seventh and the Fourth Circuits on these questions conflict. It is the Fourth Circuit which has properly applied this Court's Eleventh Amendment jurisprudence and which properly construed the Telecommunications Act.

One question presented in *Mathias* and in this case is whether, by participating in the review of interconnection

agreements pursuant to the Telecommunications Act of 1996, a State commission waives its sovereign immunity from suit in federal court. The Seventh Circuit found in *Mathias* that "the participation of the Commission in the scheme set out in the [1996] Act is a waiver of the state's sovereign immunity." 1999 U.S. App. LEXIS 20828 at *11 (7th Cir. June 18, 1999), *amended at*, 1999 U.S. App. LEXIS 20635 (Aug. 18, 1999) (referencing *MCI Telecomms. Corp. v. Illinois Commerce Comm'n*, 168 F.3d 315 (7th Cir. 1999) ("MCI")). It found that "Congress intended that the 'state commissions be parties to the federal court suits reviewing their actions, just as the FCC is a party to suits seeking review of its actions.'" *Mathias*, 1999 U.S. App. LEXIS 20828 at *13 (quoting *MCI*, 168 F.3d at 320). In this case, the Fourth Circuit decided, to the contrary, that the Telecommunications Act of 1996 does not contain a clear statement of congressional intent to condition a State commission's participation in the Act's regulatory scheme on the waiver of its sovereign immunity; thus, there could be no knowing acceptance of a waiver condition.

Another question presented in *Mathias* and in this case is whether a federal court has jurisdiction, under 47 U.S.C. § 252, to review State commission decisions that interpret and enforce reciprocal compensation terms found in interconnection agreements that have already been approved by the State commission pursuant to 47 U.S.C. § 252. The Seventh Circuit found that such a decision must be reviewed in federal court for a determination whether it complies with the requirements of § 251 and § 252, and then State courts may consider whether the decision was interpreted contrary to the terms of the

interconnection agreement. *Mathias*, 1999 U.S. App. LEXIS 20828 at *13-*14 (referencing *MCI*, 168 F.3d at 320). The Fourth Circuit decided that federal court jurisdiction is *not* available pursuant to 47 U.S.C. § 252 to review decisions of the NCUC under essentially the same circumstances, and review of the decisions is left to State courts.

A related jurisdiction question presented in this case, but not addressed in *Mathias*, is whether federal jurisdiction can be founded on 28 U.S.C. § 1331. The issue was not addressed in *Mathias* because the Seventh Circuit found jurisdiction based on the specific provision in 47 U.S.C. § 252. The Fourth Circuit concluded general subject matter is not available, based on its conclusion that 47 U.S.C. § 252 provides only limited federal jurisdiction. Otherwise it found the limitations intended in § 252 would be undermined. Thus, the NCUC agrees that this Court may find it pertinent to consider whether federal jurisdiction is available under this alternative basis.

On the other hand, the NCUC *does not* agree with the Petitioners that the *Ex parte Young* question taken for review in *Mathias* is presented in this case. In *Mathias*, the Seventh Circuit disposed of the *Ex parte Young* issue by reference to its decision in *MCI* as amended at 183 F.3d 558 (7th Cir. 1999). There, the Seventh Circuit noted that it need not address the *Ex parte Young* issue because of its decision that State authorities had waived their Eleventh Amendment immunity. *See MCI*, 183 F.3d at 567 n.4. The Seventh Circuit has since stated on rehearing of the *MCI* decision that a "straightforward" *Ex parte Young* case is presented. *MCI Telecomms. Corp. v. Illinois Bell*

Tel. Co., 222 F.3d 323, 345 (7th Cir. 2000), *cert. denied sub nom. PSC v. Wisconsin Bell, Inc.*, 121 S. Ct. 896, 148 L. Ed. 2d 802 (2001) & *Illinois Commerce Comm'n v. MCI Telcomms. Corp.*, 121 S. Ct. 896, 148 L. Ed. 2d 802 (2001). In the *Mathias* case, the *Ex parte Young* argument was presented and the Illinois commissioners were named as parties.

In this case from the Fourth Circuit, the NCUC commissioners were *never* named as parties, despite the fact that the implications of this for *Ex parte Young* was repeatedly pointed out by the NCUC in the district court. Even on appeal the Petitioner never moved for leave to amend its complaint to add the Commissioners as parties. Petitioner simply suggested that: "If the Court were to determine that there is a substantial issue as to whether a Section 252(e)(6) suit against the NCUC itself violates the Eleventh Amendment it should allow BellSouth to amend its complaints . . ." Fourth Circuit Brief for BellSouth at 55. The Fourth Circuit rightly ignored this suggestion.[7]

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[7] It did decide in *BellAtlantic*, in which the Maryland Commissioners had been sued, that "the doctrine of *Ex parte Young* does not provide an exception for the action against the individual State officials because (1) the State officials' decision was based on State contract law and arguably did not involve an ongoing violation of federal law, and (2) the federal interests served in making State officials parties to this federal court action under 47 U.S.C. § 252 (e)(6) are marginal, if not nonexistent, and do not outweigh countervailing interests of federalism." 240 F.3d at 309. NCUC agrees with this result.

Now, the Petitioner asks this Court to hold all questions, including the *Ex parte Young* question, in abeyance pending resolution of the questions in *Mathias*. Then, if *Ex parte Young* is found to apply in *Mathias*, the Petitioner argues it should be entitled to raise the issue on remand before the Fourth Circuit. On remand, the Petitioner would argue again that it should be allowed to amend its complaint either in the court of appeals or in the district court by adding the NCUC Commissioners as parties and "take advantage of" the *Ex parte Young* doctrine.. Even if this Court were to decide in *Mathias* that State commissioners were properly sued under *Ex parte Young*, this Court should not give BellSouth the relief it requests.

The cases from this Court cited by Petitioner signify that leave to amend should be "freely given when justice so requires" in district court pursuant to Rule 15 (a), *see Forman v. Davis*, 371 U.S. 178, 182 (1962) ("In the absence of any apparent or declared reason - - such as undue delay, bad faith or dilatory motive on the part of the movant, . . . undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. - - the leave sought should, as the rules require, be 'freely given,'"), and *may* be granted "sparingly" by courts of appeals pursuant to Rule 21, *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 837-38 (1989) (Courts of Appeals have the authority to dismiss a dispensable nondiverse party pursuant to Rule but such authority should be exercised sparingly after careful consideration whether any party will be prejudiced). Petitioner also cites a Third Circuit case, *Balgowan v. New Jersey*, 115 F.3d 214, 217 (3d Cir. 1997), which found Rule 21 permitted amendment on appeal to

add individual state officials and add a claim for prospective declaratory relief based on *Ex parte Young*. In that case, the motion to amend was allowed – although its filing was delayed – due to the "unexpected turn in the law as a result of *Seminole*." *Balgowan*, 115 F.3d at 217 (referencing *Seminole Tribe v. Florida*, 517 U.S. 44 (1996)). The Court observed that *Seminole Tribe* was decided when the appeal was already pending in the Third Circuit, and overruled *Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), with implications relevant to the case.

The delay in this case is more like that described in *Mills v. State of Maine*, 118 F.3d 37 (1st Cir. 1997). That case also involved a belated attempt to add State officials to the suit based on *Ex parte Young*. The First Circuit stated,

> After the Supreme Court handed down its decision in *Seminole Tribe*, and certainly after the State of Maine filed its motion to dismiss for lack of subject matter jurisdiction based upon the ruling of *Seminole Tribe*, the probation officers had every reason "to suspect [] a jurisdictional difficulty" with their case, but took "no reasonable opportunity to cure it before the appeal." Under these circumstances, we believe it is only fair and reasonable to conclude that the appellants "had fair warning in the district court and failed to act on it; enough is enough."

118 F.3d at 54-55 (quoting *Sarnoff v. American Home Prods. Corp.*, 798 F.2d 1075, 1079 (7th Cir. 1986)).

So too, here the Petitioner had fair warning; "enough is enough."

Finally, the Petitioners ask that consideration of the petition for *certiorari* in this case be held in abeyance pending a decision in *Mathias,* and in *Verizon Maryland* if *certiorari* is granted in the latter case. The NCUC does not agree that this matter should be held in abeyance. The Court would benefit from the opportunity to consider substantive arguments of parties in this case as well as *Mathias* and in *Verizon Maryland.*

CONCLUSION

The Respondent does not oppose the petition for writ of *certiorari* because some questions presented are essentially the same as those already before this Court in *Mathias*, and the decisions of the circuit courts conflict. However, the Respondent respectfully disagrees that the *Ex parte Young* question is properly raised in this case. Additionally, Respondent opposes the Petitioner's request that this petition for *certiorari* be held pending resolution of *Mathias* and *Verizon Maryland.*

Respectfully submitted,

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